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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 LYNNE S.-M.,

10 Plaintiff,

Case No. C19-5573-MLP

11 v.

ORDER

12 COMMISSIONER OF SOCIAL SECURITY,

13 Defendant.

14 **I. INTRODUCTION**

15 Plaintiff appeals denial of her application for Supplemental Security Income, contending  
16 the administrative law judge (“ALJ”) erred by finding no severe mental impairment and  
17 discounting her testimony and her fiancé’s statements. (Dkt. # 12.) As discussed below, the  
18 Court AFFIRMS the Commissioner’s final decision and DISMISSES the case with prejudice.

19 **II. BACKGROUND**

20 Plaintiff was born in 1963, has a high school education, and has worked as a hotel/motel  
21 clerk. AR at 98, 44, 25. Plaintiff applied for benefits on October 13, 2016, and alleges disability  
22 as of the application date. *Id.* at 17. After taking testimony from Plaintiff and a vocational expert  
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1 at a hearing in April 2018,<sup>1</sup> the ALJ issued a decision in August 2018 finding Plaintiff not  
2 disabled under the five-step disability evaluation process. *Id.* at 32-96, 15-26; 20 C.F.R.  
3 § 416.920. At step two the ALJ found Plaintiff had the severe impairments of lumbar spine  
4 degenerative disc and joint disease, diabetic neuropathy, and obesity, but rejected claims of  
5 severe mental impairments. AR at 17, 19-20. The ALJ found Plaintiff had the residual functional  
6 capacity (“RFC”) to perform light work with additional limitations on climbing, handling,  
7 fingering, foot use, and exposure to vibration and cold. *Id.* at 21. With that RFC, at step four the  
8 ALJ found Plaintiff could perform her past work as a hotel/motel clerk. *Id.* at 25-26.

### 9 III. LEGAL STANDARDS

10 Under 42 U.S.C. § 405(g), this Court may set aside the Commissioner’s denial of social  
11 security benefits when the ALJ’s findings are based on legal error or not supported by substantial  
12 evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). As a  
13 general principle, an ALJ’s error may be deemed harmless where it is “inconsequential to the  
14 ultimate nondisability determination.” *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)  
15 (cited sources omitted). The Court looks to “the record as a whole to determine whether the error  
16 alters the outcome of the case.” *Id.*

17 “Substantial evidence” is more than a scintilla, less than a preponderance, and is such  
18 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.  
19 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th  
20 Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical  
21 testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d

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23 <sup>1</sup> The Court declines to address Plaintiff’s argument, raised in a single sentence and a footnote in the reply  
brief, that the ALJ was not properly appointed at the time of the hearing. (Dkt. #14 at 10.) *See Indep.*  
*Towers of Wash. v. Wash.*, 350 F.3d 925, 929-30 (9th Cir. 2003) (court “will not consider any claims that  
were not actually argued in appellant’s opening brief”).

1 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it may  
2 neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas v.*  
3 *Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more than one  
4 rational interpretation, it is the Commissioner's conclusion that must be upheld. *Id.*

#### 5 IV. DISCUSSION

##### 6 A. The ALJ Did Not Err by Discounting Plaintiff's Testimony

###### 7 1. Legal Standard for Evaluating the Plaintiff's Testimony

8 It is the province of the ALJ to determine what weight should be afforded to a claimant's  
9 testimony, and this determination will not be disturbed unless it is unsupported by substantial  
10 evidence. A determination of whether to accept a claimant's subjective symptom testimony  
11 requires a two-step analysis. 20 C.F.R. § 416.929; *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th  
12 Cir. 1996). First, the ALJ must determine whether the claimant's medically determinable  
13 impairments reasonably could be expected to cause the claimant's symptoms. 20 C.F.R.  
14 § 416.929(b); *Smolen*, 80 F.3d at 1281-82. Once a claimant produces medical evidence of an  
15 underlying impairment, the ALJ may not discredit the claimant's testimony as to the severity of  
16 symptoms solely because they are unsupported by objective medical evidence. *Bunnell v.*  
17 *Sullivan*, 947 F.2d 341, 343 (9th Cir. 1991) (en banc); *Reddick v. Chater*, 157 F.3d 715, 722 (9th  
18 Cir. 1998). Absent affirmative evidence showing that the claimant is malingering, the ALJ must  
19 provide "clear and convincing" reasons for rejecting the claimant's testimony. *Burrell v. Colvin*,  
20 775 F.3d 1133, 1136-37 (9th Cir. 2014) (citing *Molina*, 674 F.3d at 1112). *See also Lingenfelter*  
21 *v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007).

1                   2.       *The ALJ Did Not Err by Discounting Plaintiff's Testimony*

2           Plaintiff testified she can only stand for five or six minutes, sit for ten to fifteen minutes,  
3 walk about half a block, and carry only lightweight articles such as a phone. AR at 74-75. The  
4 ALJ discounted Plaintiff's testimony as inconsistent with conservative treatment and failure to  
5 follow treatment recommendations to stop smoking, and undermined by a lack of supporting  
6 objective medical evidence. *Id.* at 22-24.

7           "[E]vidence of 'conservative treatment' is sufficient to discount a claimant's testimony  
8 regarding severity of an impairment." *See Parra v. Astrue*, 481 F.3d 742, 750-51 (9th Cir.  
9 2007)); *see also Meanel v. Apfel*, 172 F.3d 1111, 1114 (9th Cir. 1999) (rejecting subjective pain  
10 complaints where "claim that she experienced pain approaching the highest level imaginable was  
11 inconsistent with the 'minimal, conservative treatment' that she received"). Plaintiff's pain was  
12 treated with gabapentin throughout the relevant period, and oxycodone around the alleged onset  
13 date. AR at 23, 461. Plaintiff contends the ALJ erred by failing to acknowledge she was no  
14 longer taking oxycodone. (Dkt. # 12 at 8.) If anything, this shows Plaintiff's pain was managed  
15 even more conservatively than the ALJ indicated. Plaintiff argues that stopping oxycodone "is  
16 fully consistent with her hearing testimony that her pain was no longer well-controlled." (Dkt. #  
17 14 at 7.) But Plaintiff did not testify to any change in her pain level when she stopped taking  
18 oxycodone. She testified she has had the pain since 2012. AR at 59. Plaintiff argues that only  
19 conservative treatments are available for her conditions (dkt. # 14 at 7), but acknowledges that  
20 she is no longer taking the stronger, narcotic medication. *Id.* at 53, 61. The ALJ's finding that  
21 Plaintiff's pain was managed with conservative treatment was supported by substantial evidence  
22 and was a clear and convincing reason to discount her testimony.

1 The ALJ also discounted Plaintiff's testimony because she failed to follow repeated  
2 treatment recommendations to stop smoking. AR at 24; *see Fair v. Bowen*, 885 F.2d 597, 603  
3 (9th Cir. 1989) ("an unexplained, or inadequately explained, failure to seek treatment or follow a  
4 prescribed course of treatment" can constitute a sufficient reason for discrediting a claimant's  
5 symptom testimony). Plaintiff argues her failure to follow these recommendations is explained  
6 by the addictive nature of nicotine. (Dkt. # 12 at 9.) But Plaintiff was able to stop smoking for a  
7 year during the relevant period, indicating she was able to overcome the addictive nature of  
8 nicotine. AR at 510, 479. Under these circumstances, the ALJ permissibly inferred that  
9 Plaintiff's failure to follow treatment recommendations undermined her testimony of debilitating  
10 impairments. *See Batson v. Comm'r, Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004)  
11 ("[T]he Commissioner's findings are upheld if supported by inferences reasonably drawn from  
12 the record.").

13 Extensive normal clinical findings, such as normal gait and strength, provided further  
14 support for discounting Plaintiff's testimony. *See Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir.  
15 2005) ("Although lack of medical evidence cannot form the sole basis for discounting pain  
16 testimony, it is a factor that the ALJ can consider in his credibility analysis.").

17 The ALJ did not err by discounting Plaintiff's testimony.

#### 18 **B. The ALJ Did Not Harmfully Err in Evaluating Plaintiff's Severe Impairments**

19 Plaintiff contends the ALJ erred by finding her depressive disorder non-severe at step two  
20 and including no mental limitations in the RFC. Plaintiff concedes no medical opinion  
21 establishes any functional limitations due to depression, but argues the ALJ should have included  
22 limitations in the RFC based on Plaintiff's testimony. (Dkt. # 12 at 3.) Because the ALJ found in  
23 Plaintiff's favor at step two, she "could not possibly have been prejudiced" at that step. *Buck v.*

1 *Berryhill*, 869 F.3d 1040, 1049 (9th Cir. 2017). And, in the RFC determination, Plaintiff fails to  
2 show prejudice because she identifies no functional limitations resulting from depression. She  
3 cites symptoms such as crying, fainting, throwing up, and not liking going out, but identifies no  
4 work-related functional limitations. (Dkt. # 14 at 4.)

5 Next Plaintiff provides a long summary of treatment notes regarding various physical  
6 conditions and argues that, because such conditions could reasonably be expected to cause the  
7 limitations she described in her testimony, the ALJ erred by failing to include limitations in the  
8 RFC based on her testimony. (Dkt. # 12 at 5-7.) As discussed above, the ALJ reasonably  
9 discounted Plaintiff's testimony of physical limitations. The ALJ did not err by failing to include  
10 limitations in the RFC based on properly rejected testimony.

11 Plaintiff also argues the ALJ failed to fully and fairly develop the record by seeking  
12 mental and physical evaluations. (Dkt. # 12 at 5, 7.) However, "[a]n ALJ's duty to develop the  
13 record further is triggered only when there is ambiguous evidence or when the record is  
14 inadequate to allow for proper evaluation of the evidence." *Mayes v. Massanari*, 276 F.3d 453,  
15 459-60 (9th Cir. 2001). The record contains extensive treatment notes regarding Plaintiff's  
16 mental and physical condition, and Plaintiff identifies no ambiguity or inadequacy in the record  
17 that would trigger the ALJ's duty to develop the record.

### 18 **C. The ALJ Did Not Err by Discounting Lay Witness Statements**

19 An ALJ may discount lay witness testimony by giving a germane reason. *Diedrich v.*  
20 *Berryhill*, 874 F.3d 634, 640 (9th Cir. 2017). Plaintiff's fiancé submitted statements in November  
21 2016 and February 2017 describing Plaintiff's mental and physical condition. AR at 260-67,  
22 279-86. The ALJ discounted the statements as inconsistent with objective findings and Plaintiff's  
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1 activities. *Id.* at 25. Plaintiff asserts the ALJ's reasons are "not supported by substantial  
2 evidence" and "not germane." (Dkt. # 12 at 15.)

3 Lay witness testimony may be rejected if contradicted by medical evidence but not, as  
4 Plaintiff notes, on the grounds that it merely lacks support from medical evidence. *Bayliss*, 427  
5 F.3d at 1218; *Diedrich*, 874 F.3d at 640. Here the ALJ permissibly found Plaintiff's fiancé's  
6 extreme statements, such as that Plaintiff "can't walk or sit," inconsistent with clinical findings  
7 such as ability to walk with a normal gait and full strength in all extremities. AR at 284; *id.* at 25  
8 (citing *id.* at 537); *id.* at 23 (citing *id.* at 381). Similarly, the ALJ permissibly found his extreme  
9 statements as to Plaintiff's mental condition, such as that she does not speak or communicate  
10 with anyone except her daughter and screams at everyone, inconsistent with typically normal  
11 mental status examinations, including normal behavior, mood, and affect. *Id.* at 285, 260; *id.* at  
12 20 (citing, *e.g.*, *id.* at 367, 381, 477).

13 The ALJ did not err by discounting Plaintiff's fiancé's lay witness statements.

14 **V. CONCLUSION**

15 For the foregoing reasons, the Commissioner's final decision is **AFFIRMED** and this  
16 case is **DISMISSED** with prejudice.

17 Dated this 26th day of March, 2020.

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19 MICHELLE L. PETERSON  
20 United States Magistrate Judge  
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